IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 22.11.2006

CORAM

THE HONOURABLE MR. JUSTICE A.KULASEKARAN

Second Appeal No. 660 of 1996

1. A.P. Kuppusamy
2. P. Dhanakoti
3. P. Krishnamurthy
4. Indirani
5. L. Loganathan
6. L. Arthanareeswaran .. Appellants/appellants Plaintiff 1,2,4 to 7.

Vs.

P. Kumarapalayam Municipality,
P. Kumarapalayam rep. by its
Commissioner P. Komarapalayam
Tiruchengode Tk. .. Respondent/Respondents/ Defendants

Second appeal filed under Section 100 of Civil Procedure Code against the judgment and decree dated 27.04.1995 made in A.S.No.4 of 1995 on the file of the Subordinate Judge, Sankagiri, confirming the judgment and decree dated 28.03.1994 made O.S.No.833 of 1985 on the file of District Munsif, Tiruchengode.

For Appellants : Mr.Illango

For Respondent : Mr.Senthilkumar

J U D G M E N T

The plaintiffs, who lost their case before the Courts below, are the appellants herein. The plaintiffs have filed O.S.No.833 of 1985 on the file of District Munsif, Tiruchengode for permanent injunction and the same was dismissed, against which, they have preferred an Appeal in A.S.No.4 of 1995 on the file of Subordinate Judge, Sankagiri and the same was also dismissed. Hence the present second appeal.

2. The case of the appellants is that their father viz., Perumalsami Chettiar purchased the suit property from Murugesan Chettiar and Arthanari Chettiar under Ex.A1 dated 16.11.1950. The said Perumalsami Chettiar died on 17.06.1982, which is evident under Ex.A2. Ex.A3 series are house tax receipts issued in the name of the appellants. Citing the above said documents, the appellants sought for permanent injunction against the respondent Municipality, who attempted to construct a toilet in a portion of the suit property.

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3. The case of the respondent is that under Ex.B1 sale deed dated 04.08.1930 one Arumugha Chettiar and 8 others including Kuppan Palani

Chettiar purchased a total extent of 5.46 acres from Rengammal and Mallajiammal. Later they have partitioned the property into equal shares, thereby each one acquired 1/9th share in the said property with metes and bounds. The said Kuppan Palani Chettiar also got 1/9th share, which is equivalent to 60 2/3 cents and the same was sold under Ex.A1 by his sons Murugesan and Arthanari to the said Perumalsami Chettiar, who is the father of the appellants herein. Thus, the appellants acquired only 60 2/3 cents. It is the further case of the respondent that the appellants claimed 74 cents, for which they have no title at all. The respondent has also relied on Exs.B2, B3 and B4. Ex.B2 is the proceedings of the respondent, showing the places fixed for erecting bore wells; Ex.B3 is the resolution passed by the Municipality to construct lavatories and Ex.B4 is the approval of tender for construction of lavatories. Citing the abovesaid Exs.B2, B3 and B4, the respondent took a plea that they already erected a bore well and proposed to construct a lavatory and in view of the same, necessary steps are being taken. Hence it is not open to the appellants to seek injunction against them, that too in respect of the property not belonged to them. The respondent also took a plea of adverse possession.

4. Before the trial Court, the appellants herein have marked Exs.A1 to A3 and examined second plaintiff as P.W.1 and one Arthanari as P.W.2. The respondent herein has marked Exs.B1 to B4 and examined one Shanmughasundaram as D.W.1 and one Sakunthala as D.W.2.

5. Considering the oral and documentary evidence adduced, the trial Court dismissed the suit on the ground that when the respondent denied the title, the appellants ought to have filed the suit for declaration, but they confined it only to the relief of injunction. P.W.2 has admitted in his evidence that the respondent Municipality occupied the suit property as early as 1982 and erected a bore well. In view of the same, at the time of filing the suit, the respondent was in possession, hence, the injunction sought for by the appellants cannot be granted. While dismissing the suit, the trial Court accepted the plea of adverse possession set out by the respondent. The first appellate Court also on the very same lines dismissed the appeal filed by the appellants.

6. The second appeal is admitted on the following substantial questions of law:-

> "1. Whether the defendant had established title over the vacant site south of the built-up portions of the suit property by adverse possession in respect of the entire vacant site by satisfactory and cogent evidence?
>
> 2. Whether in view of Ex.A1, and the fact that the defendant only claims title by adverse possession over a portion of the suit property, the suit is bad for not claiming the relief of declaration?"

7. Learned counsel Mr.Illango appearing for the appellants has submitted that the appellants have proved their title under Ex.A1 as well as their continuous possession under Ex.A3 series. While so, the Courts below ought not to have dismissed the suit, rejecting the relief of injunction and prayed for allowing the second appeal.

8. Learned counsel Mr.Senthilkumar appearing for the respondent-Municipality has submitted that the respondent has denied their title in respect of a portion of the suit property. If at all, the appellants are

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entitled only to 60 2/3 cents under Ex.B1 dated 04.08.1930 whereas the appellants claimed more than 74 cents. To prove title for the same, they have not produced any valid evidence. Once the title is denied, it is for the appellants to seek appropriate remedy for declaration, but they have chosen to confine to the relief of injunction alone. Even prior to the filing of the suit and on the date of filing the suit, the respondent has been in continuous occupation of a portion of the suit property, which is evident from Exs.B2, B3 and B4. Considering the above said fact, the Courts below rightly denied the relief of injunction sought for by the appellants and hence prayed for dismissal of the second appeal.

9. This Court carefully considered the submissions of the learned counsel on both sides and perused the material papers placed on record.

10. The case of the appellants is that their father purchased the suit property under Ex.A1 dated 16.11.1950 admeasuring 100 feet X 200 feet in Door Nos. 83, 83A, 84, 84A, 84B and 84C. The said houses were constructed by their father after Ex.A1. On the southern side of the suit property, there is a itteri running from East to West. The lands on the Northern side of the said itteri also belonged to them where the respondent/municipality encroached and attempted to consturuct lavotories, hence, they filed the suit for bare injunction.

11. The respondent/municipality contested the suit stating that the appellants are entitled to only 60 2/3 cents whereas, under Ex.A1 sale deed dated 16.11.1950, they claimed 74 cents. When the appellants father purchased 1/9th share of 5 acres 46 cents from Murugesan Chettiar and Ardhanari Chettiar, claiming excess of 13 1/3 cents is untenable, hence, the appellants cannot claim right over the entire extent of 74 cents. The appellants have constructed wall on the Southern side of the suit property, beyond the said wall they are not in possession of any land. The respondent/municipality, while it was a Panchayat, was in possession of the said lands beyond the Southern side of the wall for about 50 years, thus, they perfected their title by adverse possession. The itteri shown in the Southern side of the suit property was laid by the respondent/municipality. It is admitted by PW1 in his evidence that already the respondent/ municipality erected borewell adjacent to the Southern side of the wall which was not objected to by the appellants. In and around the suit property, about 10000 weavers are residing and there is no lavatory facility available to them, hence, the respondent/Municipality has passed a resolution to construct lavatories. It is also pointed out that PW1 in his evidence admitted that the Southern side of the property, itteri is running East to West. The first appellate Court, considering the above evidence found that bore well was erected with the knowledge of the appellants herein, the land beyond the Southern side of the wall of the suit property is not in their possession. Pointing out the said factors, the first appellate Court came to the conclusion that the appellants are not in exclusive possession of the suit property and rightly confirmed the decree and judgment of the trial court.

12. The trial court came to the conclusion that since the respondent/municipality denied title of the appellants, the relief of injunction, without seeking declaration is not maintainable. The first appellate Court, based on Exs. C1 and C2 and other oral and documentary evidence held that the appellants are entitled to 77 feet on the Eastern side and 75 feet on the Western side, beyond the said extent, they have no

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right. The first appellate Court further found that though the respondent set up the plea of adverse possession, they have not proved it. Admittedly, no cross appeal is filed by the respondent as against the rejection of the plea of adverse possession.

13. In view of the clear finding of the first appellate Court that the respondent not established title over the vacant site South of the built up portion of the suit property by adverse possession and no appeal or cross-appeal is filed by the respondent, the first substantial question of law does not arise for consideration at all.

14. The second substantial question of Law is whether in view of Ex.A1 and the fact that the defendant claims title by adverse possession over a portion of the suit property, the suit is bad for not claiming the relief of declaration. It is to be remembered that the plea of adverse possession claimed by the respondent was rejected by the first appellate Court and it was not challenged. In this case, the allegation of the appellants is that the respondent/municipality encroached into a portion of the suit property. The appellants witness viz., Pws 1 and 2 in their evidence has admitted that the respondent municipality has been in possession of a portion of the suit property ever since 1982 and erected a bore well and thereafter, as seen from Exs.B2, 3 and 4, they have fixed places for erecting bore wells, resolved to construct a lavatory, called for tenders and confirmed it in favour of one contractor. The said documents support the case of the respondent that they are in possession of a portion of the suit property even prior to the filing of the suit and at the time of filing the suit. Considering the said fact, the relief of injunction sought for by the appellants was rightly rejected by the Courts below.

15. It is not the Law that the plaintiff should get his plaint amended as soon as the title is disputed by the defendant in a suit for injunction. It is well settled that in a suit for injunction, primary question to be considered is one of possession on the date of filing the suit. Of course, the question of title also may be gone into incidentally. It is also well settled that a person in possession, though, without title, can resist interference from another who has no better title than himself and get injunction. Injunction can be granted to the plaintiff when the defendant invades or threatens to invade his right to or enjoyment of the property. When the allegation of the plaintiff is that he is in lawful possession of the property and his possession is threatened to be interfered with by the defendant, he is entitled to sue for mere injunction without adding the prayer for declaration of his right.

16. In this context, it is necessary to refer to the provisions of Section 38 of Specific Relief Act, 1963. Under Section 38, the relief of injunction can be granted even if no declaratory relief is expressely prayed for. Therefore, suit for bare injunction is maintainable without the prayer of declaration of title, however, injunction can be granted to the plaintiff only if he is in actual possession. In the decision reported in (Fakirbhai Bhagawandas & another vs. Maganlal Haribai & another) AIR (38) 1951 Bombay 380 in Para-11, it is held thus:-

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"11. ....The former could obtain a declaratory decree & an injunction restraining the wrong doer.

The ratio of the judgment of their Lrodships of the P.C. is to be found in the passage at p.842:

> "it appears to their Lordships that there is here a misapprehension of the nature of the pltf's case upon the facts stated in the judgment. The possession of the pltf. Was sufficient evidence of title as owner against the defd. By S.9 of Specific Relief Act (I (1) of 1877), if the pltf. Had been dispossessed otherwise than in due course of law, he could, by a suit instituted within six months from the date of the dispossession, have recovered possession, notwithstanding any other title that might be set up in such suit. If he could thus recover possession from a person who might be able to prove a title, it is certainly right & just that he should be able, against a person who has no title & is a mere wrong-doer, to obtain a declaration of title as owner & an injunction to restrain the wrong-doer from interfering with his possession. The Appellate Ct. in accordance with the judgment above quoted, has dismissed the suit. Consequently, the deft. May continue to wilfully, improperly & illegally interfere with the pltf's possession, as the learned Judges say he has done, & the pltf. Has no remedy. Their Lordships are of opinion that the suit should not have been dismissed; and that the pltf. Was entitled in it to a declaration to negative that the land was dedicated to religious or charitable purposes, a question upon which the Original & Appellate Ct. have differed & which as the only deft. Was not entitled to maintain the Wakfnama & other persons would not be bound by an adverse decision, their Lordships do not decide."

This decision of their Lordships of the P.C. Lays down that it is not necessary for the person claiming injunction to prove his title to the suit land. It would suffice if he proves that he was in lawful possession of the same & his possession was invaded or threatened to be invaded by a person who had no title whatever...."

In the decision reported in (Muthayyan Swaminatha Sastrial and others v. S. Narayanaswami Sastrial and others) AIR 1936 Madras 936, it was held thus:-

> "....Their allegation is that they are in lawful possession of the properties and that their possession is threatened to be interfered with by the defendants. On these allegations, they were perfectly entitled to sue for a mere injunction. The learned District Munsif was, therefore, wrong in ordering the amendment of the plaint."

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17. In view of the above decisions and also the discussion made above, the finding of the courts below that without seeking the relief of declaration, the relief of injunction sought for in the suit is bad is set aside and the second substantial question of law is answered against the respondent, however, this finding will not give any relief to the appellants since they failed to prove that they are in possession.

18. In view of the above said discussion, this Court is of the considered view that the judgment and decree passed by the Courts below are perfectly valid and no interference is warranted. Hence, the second appeal fails and the same is dismissed. No costs. In case if the parties herein seek other relief, the observations made in this second appeal not stand in their way since the said observations or findings are confined only to this case.

rsh

Sd/-
Assistant Registrar

/true copy/

Sub Assistant Registrar.

To

1. The Subordinate Judge,
   Sankagiri.

2. The District Munsif,
   Tiruchengode. (with records)

3. The Record Keeper,
   V.R.Section, High Court of Madras.

+ One cc to Mr. Muthumani Doraisami, Advocae SR 57017

MJ (co)
sg 01/2/07

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